

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MURIEL L. ROBERTSON
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-77
Case No. 70-667

S.S.A. No.

WELLS FARGO BANK
(Employer)

Employer Account No. ---

The claimant appealed from Referee's Decision No. SF-13926 which disqualified him for unemployment compensation benefits under the provisions of section 1256 of the Unemployment Insurance Code and which relieved the employer's reserve account of benefit charges under section 1032 of the code on the ground that the claimant had been discharged for misconduct connected with his most recent work. The claimant has submitted written argument. Such argument has not been received from the employer or the Department.

STATEMENT OF FACTS

The claimant was last employed as a security guard by the above identified employer for a period of six weeks. This employment ended with the claimant's discharge on October 8, 1969.

On August 12, 1969 the claimant completed and signed an employment application which included a question: "Have you ever been arrested, held for indictment or finger printed by the police for any reason. If yes, give details." The claimant answered "no." The form provided:

"If in the judgment of Wells Fargo Bank, I have knowingly withheld necessary information, given false information, or made misrepresentations, any offer of employment may be withdrawn or employment terminated without liability to the bank other than for services I have actually rendered."

The claimant was hired and commenced the performance of his duties which included the distribution of money carts on the various floors and general security work. The claimant performed his duties in a satisfactory manner. At about 1 p.m. on October 8, 1969 the claimant was advised that the employer had obtained a copy of his arrest record and that it would be necessary to discharge him. Thereafter, the claimant's supervisor discussed the claimant's record with the bank's auditing department in an effort to retain his services but was unsuccessful, and the claimant was discharged at the close of the work shift.

In accordance with standard procedures, the employer had taken the claimant's fingerprints and had a security check made on him. The claimant's record showed a number of arrests commencing in 1950 when he was still a minor. In 1956 he was arrested on suspicion of robbery. He was released three days later without any charges being filed against him. The most recent arrest was in 1957 and the charges were dismissed.

The claimant testified he did not reveal his arrest record when completing the employment application because he had been cleared by the Navy in 1966, had never been convicted of a crime, and considered the information to be irrelevant. He was aware of the distinction between being arrested and convicted.

The employer's vice-president testified that, if a prospective employee shows an arrest record on his employment application, a check is made and, if in the opinion of the employer's reviewing authority the arrest record is not serious and there are no convictions, a decision may be made to either hire or retain the individual in its employ. Normally, however, if the employee has failed initially to reveal his arrest record, he is

discharged for withholding the information. In the claimant's case he was confronted with his arrest record but denied ever being arrested on suspicion of robbery. The reviewing authority, believing the claimant had had three opportunities to reveal his arrest record, concluded the claimant could not be retained in employment.

REASONS FOR DECISION

If a claimant has been discharged for misconduct connected with his most recent work, he is held disqualified for benefits under section 1256 of the California Unemployment Insurance Code for the period prescribed in subdivision (a) of section 1260 of the code. In these circumstances, in accordance with code sections 1030 and 1032, the employer's reserve account may then be relieved of any charges for benefits which may be paid to that particular claimant based upon wages paid to him during the base period of his claim.

A finding of misconduct must be based on probative evidence of a deliberate or wilful act or course of conduct in derogation of an employer's interests. Actual damage need not be proved for it is sufficient if the act or course of conduct "tends to injure the employer's interests." In Appeals Board Decision No. P-B-3, we reiterated this principle. We described the genesis of the term "misconduct" in the context of several judicial decisions, including the case of Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 Pac. 2d 947, the leading California judicial authority defining this term as used in sections 1256 and 1030 of the code.

In his written argument the claimant's attorney contends the claimant had good cause for his failure to reveal his arrest record in view of the fact that such disclosures have a "chilling effect" on gainful employment. He cites various studies made which indicate that a high percentage of employers will not hire individuals with an arrest record even though there have been no convictions.

We have no doubt that many employers do refuse to hire individuals with an arrest record, But, it is also true that many employers will hire under such

circumstances after having had the opportunity to investigate the nature and reasons for the arrests. The record discloses that the instant employer does hire and retain individuals with an arrest record, after having had the opportunity to investigate the nature of the charges. However, it is standard procedure for this employer to terminate employees who have withheld such information or falsified the employment application at the time of hire.

Counsel for the claimant has cited no statutory authority prohibiting employers from questioning prospective employees concerning arrests or convictions, and we are not aware of any such prohibition. The California Labor Code does limit the areas of inquiry an employer may make in connection with prospective employment but the disclosure of an arrest record is not one of them. (See, for example, section 1420 of the Labor Code.) The act of making application for employment carries with it of necessity the requirement that matters of proper concern to a prospective employer are open to its inquiry. This inquiry may be very broad. Considering the nature of the job for which the claimant made application, security guard, and the nature of the employer's business, we can only conclude that the inquiry was proper and a necessary safeguard to the employer in the selection and retention of its employees.

We can find no basis for excusing the claimant's failure to reveal his arrest record. The claimant owed a duty to the employer to disclose his prior arrests. There was a substantial breach of that duty. The claimant was aware of his duty and did wilfully violate it. While the employer has not shown actual damage to its interest, the claimant's action did evince a disregard of the employer's interests and would tend to injure the employer. These are the essential elements which show that the claimant's discharge was for misconduct within the meaning of section 1256 of the code.

DECISION

The decision of the referee is affirmed. Benefits are denied as provided in the referee's decision and the employer's account is relieved of charges.

Sacramento, California, May 26, 1970

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

CONCURRING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

CONCURRING OPINION

While we have concluded that the evidence in this case supports the decision, we feel that it is necessary to express some reservations concerning the possible broad implications of the decision. In other words, we do not wish our concurrence in the decision to be interpreted as meaning that we would find any failure to reveal an arrest record, no matter how inconsequential that record may be or how remote in time, must necessarily constitute misconduct. Nor do we subscribe to the view that in all cases such inquiry is a proper and necessary safeguard to the employer's interests.

We also are of the opinion that this case would not apply unless the employer has asked the applicant to complete a written employment application form and the questions on such employment application form are specific and reasonable.

LOWELL NELSON

DON BLEWETT